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Series 2004-OPTS; Homeward Residential, Inc., f/k/a American Home Mortgage Servicing, Inc.;  
and Power Default Services, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
EUREKA DIVISION

LISA A. CHURCH,

Plaintiff,

v.

Wells Fargo Bank, N.A., as Trustee for ABFC  
2004-OPT5 Trust, ABFC Asset-Backed  
Certificates, Series 2004-OPTS; Homeward  
Residential, Inc., f/k/a American Home  
Mortgage Servicing, Inc. (Mortgage Servicer);  
Power Default Services, Inc. (Trustee); All  
Persons Unknown, Claiming Any Legal or  
Equitable Right, Title, Estate, Lien, or Interest in  
the Property Described in the Complaint  
Adverse to Plaintiff's Title, or any Cloud on  
Plaintiff's Title, and Does 1-20, inclusive,

Defendants.

CASE NO.: 13-cv-00166-NJV

**NOTICE OF MOTION AND MOTION TO  
DISMISS COMPLAINT; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

**[REQUEST FOR JUDICIAL NOTICE AND  
(PROPOSED) ORDER FILED  
CONCURRENTLY HEREWITH]**

Date: February 26, 2013

Time: 1:00 p.m.

Dept: 205A

Complaint Filed: December 18, 2012

TO THE CLERK OF THE ABOVE-ENTITLED COURT, ALL PARTIES AND THEIR  
COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 26, 2013 at 1:00 p.m. or as soon thereafter as the  
matter may be heard before the Honorable Nandor J. Vadas. in Courtroom 205A, located at 514  
"H" Street, Eureka, California, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,  
Defendants Wells Fargo Bank, N.A., as Trustee for ABFC 2004-OPT5 Trust, ABFC Asset-Backed  
Certificates, Series 2004-OPTS; Homeward Residential, Inc., f/k/a American Home Mortgage



1 Servicing, Inc.; and Power Default Services, Inc. (“Defendants”) will move the Court for an order  
2 dismissing Plaintiff Lisa A. Church’s Complaint (the “Complaint”) on the grounds that the  
3 Complaint fails to state any claim upon which relief can be granted.

4 This Motion is based on this Notice of Motion and Memorandum of Points and Authorities;  
5 the accompanying Request for Judicial Notice; all pleadings and papers on file in this action; and  
6 such other and further matters as the Court may consider.

7 Dated: January 18, 2013  
8

9 SMITH DOLLAR PC

10 /s/ Sherrill A. Oates

11 By \_\_\_\_\_  
12 Sherrill A. Oates  
13 Attorneys for Defendants Wells Fargo Bank, N.A.,  
14 as Trustee for ABFC 2004-OPT5 Trust, ABFC  
15 Asset-Backed Certificates, Series 2004-OPTS;  
16 Homeward Residential, Inc., f/k/a American Home  
17 Mortgage Servicing, Inc.; and Power Default  
18 Services, Inc.  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION AND RELEVANT FACTS**

Lisa Church (“Plaintiff”) is the owner of the property located at 230 Olson Road, Shelter Cove, California (the “Property”). Complaint ¶ 1. Plaintiff has erroneously sued and served Wells Fargo Bank, N.A. (“Wells”) in its individual capacity as a national bank, despite the fact that Wells’ true function in this case was as the trustee for a pool of securitized loans known as the ABFC 2004-OPT5 Trust, AGFC Asset-Backed Certificates, Series 2004 OPT5 (the “Trust”). Complaint caption; ¶ 2. As to Defendants Homeward Residential, Inc (“Homeward”) and Power Default Services, Inc. (“Power”), all Plaintiff pleads is that they are Delaware corporations. Complaint ¶ ¶3, 4. All defendants together may be referred to as “Defendants” from time-to-time in this brief.

In June 2004, Plaintiff admits she executed loan documents and received a loan secured by Plaintiff’s Property. Complaint ¶ 13. Plaintiff admits that at some point since 2004, she fell behind in her payments on the Loan. Complaint ¶ 23. Plaintiff claims that she suffered personal [loss of spouse] and economic [loss of job] problems in February 2012 and she struggled to make her payments each month. Complaint ¶ 25. Plaintiff pleads that she contacted Homeward for help. Complaint ¶ 26. Homeward then sent her a financial package to complete, and that it made requests for various documents that Plaintiff felt were “redundant.” Complaint ¶ 26. Plaintiff pleads that she received a Notice of Default (“NOD”) in August 2012, and she admits that she had contact with the Loan’s beneficiary or its loan servicer, Homeward regarding a loan modification, but that no other pre-foreclosure alternatives were discussed. Complaint ¶¶ 27, 28. Plaintiff claims her payments were not being properly credited, and Plaintiff sent what she claims was a Qualified Written Request (“QWR”) pursuant to the Real Estate Settlement Procedures Act (“RESPA”) but Homeward has not responded in a way that Plaintiff believes would be in compliance with the statute. Complaint ¶ 32.

On or about August 14, 2012, a Substitution of trustee (“SOT”) was recorded, substituting Power in as Trustee under the Deed of Trust. Request for Judicial Notice Ex.1.

The “General Allegations” of the Complaint claim an assortment of alleged wrongdoing as follows:



1 (a) a “securitization scheme” [¶10];

2 (b) Plaintiff seeks an injunction requiring the owner of the loan to reconvey it to  
3 Plaintiff (or alternatively, to quiet title to the Property in her alone) [¶ 11];

4 (c) the parties foreclosing on Plaintiff’s Property lack standing to do so [¶¶ 12, 46, 47,  
5 49]; (d) no one explained the terms of her loan to her and she was not allowed to review the  
6 loan documents prior to executing them, thus Plaintiff alleges that the loan was procedurally and  
7 substantively unconscionable [¶¶ 14, 15, 16, 17, 18, 19, 21];

8 (e) after Plaintiff became delinquent, no one met “face-to-face” with her regarding the  
9 delinquency on the loan [¶ 23];

10 (f) Plaintiff claims that the Trust is not the true beneficiary because the assignment to  
11 the Trust was somehow improper and the Trust was “closed out” in 2004 [¶¶ 33, 34];

12 (g) Plaintiff alleges that the power of sale contained in the Deed of Trust failed because  
13 it was not recorded pursuant to a statute that does not apply to Deeds of Trust (Civil Code §  
14 2932.5), and the trustee is not authorized to act for the beneficiary because there was no written  
15 substitution of trustee (“SOT”) as required by the Statute of Frauds (Civil Code § 1624) [¶¶ 38, 45];

16 (h) The Rosenthal Fair Debt Collection Act was violated [¶¶ 39-44]; and

17 (i) the beneficiary of the Deed of Trust was not disclosed to Plaintiff [¶ 48].

18 The Complaint in this matter alleges 16 separate claims for relief as follows: (1) improper  
19 loan and no effective endorsement; (2) California Civil Code Violations; (3) breach of the implied  
20 covenant of good faith and fair dealing, unfair and unacceptable loan servicing; (4) Civil Code  
21 violation 2923.6; (5) Perrata Act Violations; (6) HUD violations; (7) breach of contract; (8)  
22 negligence; (9) breach of Civil Code §§ 2923, 2924; (10) failure to [sic] conditions precedent; (11)  
23 promissory estoppel; (12) quasi-estoppel; (13) unclean hands; (14) violation of 17200; (15)  
24 declaratory relief; (16) emergency temporary/permanent injunctive relief. Defendants will show  
25 herein that none of Plaintiff’s claims has any merit and this case should be dismissed with  
26 prejudice.



## II. LEGAL ARGUMENT

### A. Legal Standard

Dismissal is appropriate under Fed. Rule Civ. P. 12(b)(6) where the Complaint fails to state either a “cognizable legal theory” or “sufficient facts alleged under a cognizable legal theory.” *Balisteri v Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). “A motion to dismiss tests whether the allegations in a complaint, if true, amount to an actionable claim.” *United Guaranty Mortgage Indemnity Co. v. Countrywide Fin. Corp.*, 660 F.Supp.2d 1163, 1170 (C.D. Cal. Oct. 5, 2009). In reviewing a complaint, the Court need not accept as true unwarranted deductions, unreasonable inferences, conclusory allegations or legal characterizations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 980 (9th Cir. 2001); *see also Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). The Complaint must set forth sufficient factual allegations to raise the right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A plaintiff must do more than simply file “an unadorned ‘the-defendant-unlawfully-harmed-me’ accusation.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Merely reciting the elements of a cause of action is also not enough. *Id.*

### B. Request for Judicial Notice

The Court may take judicial notice of matters of public record if the documents are “either ‘generally known within the territorial jurisdiction of the trial court’ or ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” Fed. R. Evid. 201(b). Deutsche has requested that this Court take judicial notice of the various recorded documents concerning the Property, as well as the relevant portions of the disputed PSA alleged in the Complaint at ¶ 31. “The documents submitted by Defendants are publically recorded [and publically available] documents of which judicial notice may properly be taken, and accordingly, those documents may be considered in deciding Defendants’ dismissal motion.” *Gardner v. Am. Home Mortg. Servicing*, 691 F. Supp. 2d 1192, 1196 (E.D. Cal. 2010). Likewise, Defendants’ request for judicial notice is appropriate in this case because all of the documents in its request for judicial notice are recorded documents.





**C. The Complaint Fails Globally.**

The entire Complaint consists of Plaintiff's speculation about the securitization process and what becomes of defaulted loans that had previously been securitized, long-rejected claims concerning standing to foreclose, and "show me the note" allegations, but no facts whatsoever in support of any of Plaintiff's claims. The entire Complaint fails to meet the pleading requirements of *Twombly*, *supra*, that the factual basis of the claims alleged must be set forth upon sufficient facts to raise the claim for relief above the speculative level. *Twombly*, *supra*, 550 U.S. 544, 555. Defendants submit that nothing in the Complaint nudges Plaintiff's claims from possible to plausible, and therefore, Defendants' Motion to Dismiss the Complaint should be granted in full.

**D. Each Cause of Action Fails.**

**1. Defendants Have Standing to Foreclose.**

Plaintiff's first and second causes of action claim that none of the Defendants, nor apparently, anyone else, has authority to foreclose upon Plaintiff's admittedly-defaulted loan because no one has the proper standing to foreclose for a variety of reasons. The first cause of action pleads acts concerning the origination of the loan in June 2004.

Plaintiff admits that she incurred a debt when she received her Loan. Complaint ¶ 54. She claims that the terms of the Loan were never explained, and fees were not explained. Complaint ¶¶ 57, 58. Plaintiff also claims that her ability to repay the loan was never assessed. Complaint ¶¶ 59. Plaintiff claims that she was rushed when signing the documents and that she did not understand what she was signing. Complaint ¶¶ 60, 61. All of these things occurred before or during the execution of the loan documents in June 2004, for a loan received by Plaintiff from Option One Mortgage Company—an entity that Plaintiff has not even named in this action. All of these alleged incidents of wrong-doing have, according to the Complaint, resulted in no party being the "holder in due course due to Fraud in the Factum and ineffective endorsement." Complaint ¶ 62.

The statute of limitations bars all of Plaintiff's claims concerning alleged wrongdoing that occurred at the Loan's origination. All of Plaintiff's claims sound in fraud. Therefore, the statute of limitation that should apply to Plaintiff's origination-related claims is three years. Code Civ. Proc. § 338. Since "Lack of Standing" is not a cause of action addressed by any of the codified



1 statutes of limitation, even applying the catch-all four-year statute of limitation to Plaintiff's claims  
 2 will not help her, as the "Lack of Standing" cause of action expired in June of 2008. Plaintiff  
 3 received her loan in 2004 and pleads that she had no problems making her payments until February  
 4 2012, almost eight years later, and after Plaintiff lost her job and her spouse. Complaint ¶ 25. Thus,  
 5 the first cause of action for "Lack of Standing" is barred by the statute of limitation. In addition,  
 6 these Defendants cannot be held liable for the actions of another un-named party based upon the  
 7 allegations of the Complaint.

8 The second cause of action titled "Defendants Lack Standing" is based in part upon Civil  
 9 Code § 2932.5 ("§ 2932.5"), a statute that requires assignments of *mortgages*, but not deeds of trust,  
 10 to be recorded. Complaint ¶ 67. Plaintiff acknowledges that §2932.5 governs assignments of  
 11 mortgages, but she fails to acknowledge that a mortgage and a deed of trust are not interchangeable.  
 12 For more than a hundred years, California has recognized a distinction between the need to record  
 13 an assignment of a *mortgage* and a *deed of trust*. Only an assignment of a mortgage needs to be  
 14 recorded before the power of sale is exercised. *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th  
 15 118, 130 Cal. Rptr. 3d 815, 819 (2011), rev. denied (Cal. S. Ct. Jan. 4, 2012). Plaintiff cannot state  
 16 any claim based upon a non-recorded assignment of her Deed of Trust. Moreover, here, Plaintiff's  
 17 Assignment of her Deed of Trust was recorded, thus all of Plaintiff's claims to the contrary must be  
 18 disregarded as they are contradicted by an exhibit to the Complaint. *See* Complaint Ex. C (p. 47).

19 Plaintiff also seems to advance a claim regarding an alleged separation of the Note from the  
 20 Deed of Trust. Complaint ¶¶ 69-79; 82. Plaintiff has attached a copy of the recorded assignment of  
 21 Plaintiff's Deed of Trust to her Complaint as Exhibit C. Plaintiff has misread the recorded  
 22 document. It states that Sand Canyon, formerly known as Option One Mortgage Corporation,  
 23 assigned its interest in the Deed of Trust, "together with the Promissory Note secured by said Deed  
 24 of Trust . . . ." to Wells Fargo Bank, N.A., as Trustee for ABFC 2004-OPT5 Trust, ABFC Asset-  
 25 Backed Certificates, Series 2004-OPT5. Complaint Ex. C (p. 47). Plaintiff has not factually  
 26 supported her claim that no party, including Wells as Trustee for the Trust, has the authority to  
 27 foreclose on her.

28 Defendants' Motion to Dismiss Plaintiffs first and second causes of action based upon an

1 alleged lack of standing should be granted, and since Plaintiff can never overcome the pleading  
2 deficiencies with these two claims, leave to amend should be denied.

3 **2. There was no Breach of Contract nor Bad Faith.**

4 The third and seventh causes of action allege breach of the implied duty of good faith and  
5 fair dealing and breach of contract, respectively. Throughout the Complaint, Plaintiff alleges that  
6 there is no party that can claim status as the beneficiary of her Deed of Trust, but in her third cause  
7 of action, Plaintiff contradicts herself and claims that the foreclosing defendants should have dealt  
8 differently with her when she became delinquent on her loan, perhaps by offering her a  
9 modification under the Home Affordable Modification Program (“HAMP”). Complaint ¶ 89. In  
10 this cause of action, Plaintiff seems to recognize Wells’ (as Trustee for the Trust) status as the  
11 Loan’s beneficiary, and thus its authority to possibly modify her loan. *See* Complaint ¶¶ 92, 94.

12 Plaintiff alleges a litany of supposed failings by Wells (as Trustee), but not a single fact that  
13 supports Plaintiff’s legal conclusions. *See* Complaint ¶ 94 a-l. Plaintiff also complains that Wells  
14 failed to adhere to its own servicing guidelines. *See* Complaint ¶¶ 95-99. Plaintiff appears to claim  
15 that she should be considered a beneficiary of Wells’ servicing guidelines. *See* Complaint ¶97.

16 Merely stating that guidelines exist, and that Wells [ ] did not follow those  
17 guidelines, is not sufficient to ‘show that [Plaintiff] is entitled to relief.’ Fed. R. Civ.  
P. 8(a)(2). Therefore, the complaint fails to state a claim on this theory.’

18 *Kariguddaiah v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 65561 (N.D. Cal. July 1, 2010).

19 The seventh claim is for breach of contract, and the contract Plaintiff claims was breached is  
20 the Servicer Participation Agreement (the “SPA”) that Wells entered with the United States  
21 government to participate in the Making Homes Affordable program. Complaint ¶ 118. The  
22 entirety of this cause of action is dedicated to Plaintiff’s theories regarding her status as a third-  
23 party beneficiary under the SPA. Claims arising under the SPA have been nearly universally  
24 rejected. “[A] borrower is not a third party beneficiary [under the SPA].” *Hoffman v. Bank of Am.*,  
25 *N.A.*, 2010 U.S. Dist. LEXIS 70455 (N.D. Cal. June 30, 2010) (collecting cases).

26 Plaintiff’s claims for bad faith and breach of contract are based upon rejected legal theories  
27 and Plaintiff has pled no factual support for either claim. Therefore, Defendants’ Motion to  
28 Dismiss these claims should be granted.



1           **3.     No Civil Code §§ 2923.6, 2923.5, Perrata Act or 2924 Violations**  
2           **Occurred.**

3           The fourth, fifth and ninth causes of action allege various violations of the California  
4           foreclosure statutes. The fourth cause of action is pled under Civil Code § 2923.6 (“§ 2923.6”). At  
5           the time of the acts alleged in the Complaint (2012), § 2923.6 did not provide a private right of  
6           action. *Kirk v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 3610, \* 8 (N.D. Cal. Jan. 9, 2013).  
7           The statute has been amended, and the amendments took effect on January 1, 2013, but those  
8           amendments were not retroactive and do not reach past conduct because the amendments were  
9           substantive and the Legislature did not state that they were to be retroactive. *See Lotenero v.*  
10          *Everett Fin., Inc.*, 2011 U.S. Dist. LEXIS 64619 (E.D. Cal. June 16, 2011) (discussing whether or  
11          not later amendments to law existing at the time of acts complained of were retroactive and finding  
12          they were not). Plaintiff had no private right of action under § 2923.6.

13          Plaintiff’s fifth cause of action is for “Violation of the Perrata Act.” Plaintiff claims that  
14          Wells and Homeward failed to fully explore foreclosure alternatives with Plaintiff [¶ 108]; violated  
15          § 2923.5 because they did not inform Plaintiff of options to avoid foreclosure [¶ 109.a.]; and did not  
16          file an accurate declaration with the recorder’s office [¶ 109.b.]. Thus, Plaintiff alleges she has  
17          been damaged. Complaint ¶ 110. Plaintiff has alleged no facts at all in support of her claim that  
18          the Peratta Act was violated, and in reality, what she has alleged shows that Defendants complied  
19          with the Act. For example, Plaintiff acknowledges that she was having trouble with her payments  
20          and that she and Homeward engaged in a period of back-and-forth regarding a possible loan  
21          modification. *See* Complaint ¶¶ 25, 26. In fact, Plaintiff pleads that she had been in contact with  
22          Homeward for over six months regarding a loan modification. Complaint ¶ 29. Nothing in the  
23          Perrata Act requires any Defendant to modify Plaintiff’s loan. “Plaintiff [is] not entitled to any  
24          particular outcome, and defendants are not required to provide a loan modification or other relief.  
25          Again, the only relief available is in the form of postponement of a foreclosure sale.” *Tall v.*  
26          *Mortgage Elec. Registration Sys.*, 2012 U.S. Dist. LEXIS 162910, \* 9 (N.D. Cal. Nov. 13, 2012).

27          Plaintiff’s ninth cause of action claims that Civil Code § 2923 and § 2924 were violated.  
28          Here, Plaintiff admits that Power is the proper foreclosing trustee. Complaint ¶ 133. Plaintiff also



claims that she never received service of the Notice of Sale (“NOS”). Complaint ¶ 134. Elsewhere in the Complaint, however, Plaintiff acknowledges that she received a copy of the NOS. Complaint ¶ 29. Clearly, whether or not the NOS was properly served was not prejudicial to Plaintiff, as she was able to go into State Court and receive a Temporary Restraining Order, halting the pending foreclosure sale. *See* ECF No.1; *Knapp v. Doherty*, 123 Cal. App. 4th 76, 94 (2004) (premature NOS in violation of statute did not invalidate sale because borrower suffered no prejudice).

Here again, Plaintiff cites to §2923.6 to support her claim that the foreclosure statutes were violated, but § 2923.6 does not require a lender to modify a borrower’s loan. *Tall*, 2012 U.S. Dist. LEXIS 162910, \* 9 (Complaint ¶ 137).. Plaintiff has pled no facts in support of her claim that the Perrata Act, § 2923.5, § 2923.6, or § 2924 was violated, and Defendants’ Motion to Dismiss those claims should be granted.

**4. There was no HUD Violation (Sixth and Tenth Causes of Action).**

Plaintiff’s sixth cause of action claims that the Housing and Urban Development (“HUD”) regulations were violated. The tenth cause of action also makes similar allegations regarding the National Housing Act (“NHA”) and claims that a default could not have occurred because of the failure of a condition precedent. The statute cited by Plaintiff as support for this claim, 12 U.S.C. § 1701x(c)(5), is related to loan servicing requirements under the NHA. First, Plaintiff has failed to plead that hers was a loan subject to the NHA. Second, even if it is, there is no private right of action under the NHA. *Holbrook v. Aurora Loan Servs. LLC*, 2010 U.S. Dist. LEXIS 25174, \*15-16 (C.D. Cal. Mar. 15, 2010) (collecting cases finding no private right of action under the NHA).

Similarly, the tenth cause of action claims that the NHA was violated, and thus, foreclosure is improper. Complaint ¶ 143. Plaintiff cites several regulations under the NHA: 24 C.F.R. §§ 203.602, 203.604, 204.604(b), 203.501, 203(c) and 203, and flatly proclaims that Defendants failed to comply with these sections. Complaint ¶ 144. Even if that is true, however, “[n]either the National Housing Act nor its implementing regulations (including 24 C.F.R. §§ 203.604, and 203.605) provide for a private right of action.” *Inman v. Suntrust Mortg., Inc.*, 2010 U.S. Dist. LEXIS 91804, \*7 (E.D. Cal. Sept. 3, 2010) (collecting cases).

Plaintiff has not stated a claim for any HUD or NHA violation, thus Defendants’ Motion to



Dismiss should be granted, and because these claims can never be successfully pled, leave to amend should be denied.

**5. There was no Negligence.**

Plaintiff's eighth cause of action is for negligence. Plaintiff claims here that Wells was her loan servicer, despite the fact that elsewhere in the Complaint, she pleads that Homeward was her loan servicer. *See* Complaint ¶ 127; ¶ 31. Plaintiff claims that Wells sent out documents to Plaintiff regarding a loan modification, but a loan modification was never finalized. "To prevail on [a] negligence claim, plaintiffs must show that [defendants] owed them a legal duty, that [defendants] breached the duty, and that the breach was a proximate or legal cause of their injuries." *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 477 (2001). It is well-established under California law that a financial institution owes no duty to borrowers when the institution's involvement in the loan transaction does not exceed the scope of its role as a lender of money. *See Nymark v. Heart Fed. Savings & Loan Ass'n*, 231 Cal. App. 3d 1089, 1096 (1991); *see also Oaks Mgmt. Corp. v. Super. Ct.*, 145 Cal. App. 4th 453, 466 (2006) ("a loan transaction is at arms-length and there is no fiduciary relationship between the borrower and lender.")

The Complaint fails to set forth Defendants' duty to Plaintiff. Plaintiff pleads that Wells generally failed to consider Plaintiff for a loan modification. Complaint ¶ 128. Moreover, Plaintiff pleads that statements made by Wells to Plaintiff were false – a factually unsupported fraud claim. *See* Complaint ¶ 128. Defendants sent an application for a loan modification to Plaintiff, and asked for additional information that Plaintiff deemed duplicative. *See* Complaint ¶ 26. Nowhere has Plaintiff set forth any Defendants' duty to her, nor has she pled how that duty was breached or how she was damaged as a result. Thus, the negligence claim must fail and Defendants' Motion to Dismiss it should be granted.

**6. There is no Claim for Promissory or Quasi- Estoppel.**

Plaintiff's eleventh cause of action is for promissory estoppel and the twelfth claim is for quasi-estoppel. The promissory estoppel claim is based again upon Homeward's offer to consider Plaintiff for a modification under HAMP. Complaint ¶ 147. The elements of a promissory estoppel claim are ““(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the



1 promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party  
 2 asserting the estoppel must be injured by his reliance.” *Aceves v. U.S. Bank N.A.*, 192 Cal. App.  
 3 4th 218, 225 (Cal. App. 2d Dist. 2011) (quoting *Advanced Choices, Inc. v. State Dept. of Health*  
 4 *Services*, 182 Cal.App.4th 1661, 1672 (2010)).

5 Successful promissory estoppel claims based upon the offer of a loan modification require a  
 6 plaintiff to change her position in reliance upon the promise to modify the loan. For example, in  
 7 *Aceves*, the lender promised the borrower that it would work with her to modify her loan if she  
 8 would not convert her pending Chapter 7 Bankruptcy to a Chapter 13, and not oppose the lender’s  
 9 motion for relief from the automatic stay. *Aceves*, 192 Cal.App.4th 227. When the lender foreclosed  
 10 on the borrower instead of modifying her loan, the court applied the tenets of promissory estoppel  
 11 and found the lender might be liable for contract damages under plaintiff’s promissory estoppel  
 12 theory. *Id.* at 231. In this case, Plaintiff never changed her position in reliance on any promise by  
 13 any Defendant. As a result, the promissory estoppel claim must fail.

14 Plaintiff’s twelfth cause of action is for quasi-estoppel, and pleads that the theory is also  
 15 known as “estoppel by conduct.” Complaint ¶ 151. In support of her claim, Plaintiff resorts again  
 16 to the meritless theories that Defendants could be guilty under HAMP, the NSA or Wells’ servicing  
 17 guidelines. *Id.* Plaintiff has not pled that Defendants have taken any inconsistent position, however.  
 18 In fact, Plaintiff pleads that Defendants’ position has been extremely consistent—starting a non-  
 19 judicial foreclosure, talking with Plaintiff for over six months concerning a possible loan  
 20 modification, but continuing to give the foreclosure notices and heading toward the Trustee’s Sale  
 21 of the Property. Defendants’ conduct has been exactly consistent throughout the process and  
 22 Plaintiff has failed to state a claim.

23 Neither Plaintiff’s promissory estoppel nor her quasi-estoppel claim has stated any claim for  
 24 relief against these Defendants and their Motion to Dismiss these claims should be granted.

25 **7. Unclean Hands is a Defense – not an Affirmative Cause of Action.**

26 Plaintiff’s thirteenth cause of action is for unclean hands and claims that due to all of the  
 27 alleged wrongdoing pled in the Complaint, none of the Defendants deserves the right to “the  
 28 equitable relief of foreclosure. . . .” Complaint ¶ 155. Defendants are seeking the statutory relief

provided by the non-judicial foreclosure statutes, however. Civil Code § 2924 *et seq.* It appears that Plaintiff believes she is answering or defending a foreclosure suit by appealing to this Court to stop her foreclosure. Plaintiff appears to believe that this Court can refuse to accelerate the Note and deny Defendants their contractual and statutory right to foreclose. *See* Complaint ¶ 155. Plaintiff is mistaken, however, and she is not entitled to assert the affirmative defense of unclean hands in a separate action, brought by her, to stop a statutory non-judicial foreclosure of her Property after her admitted default. *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 668 (9th Cir. Cal. 2012). Moreover, even if the unclean hands doctrine was available to Plaintiff here, she pleads that she was in default of her loan payment obligations, thus she is not entitled to assert the affirmative defense because she herself has unclean hands. *Id.* Plaintiff has failed to state a claim against these Defendants for unclean hands and their motion to dismiss the claim should be granted.

**8. There was no Violation of Bus. & Prof. § 17200.**

Plaintiff's fourteenth cause of action is for violation of Business and Professions § 17200 (the "UCL"). Plaintiff has incorporated all of the previous insufficient allegations in support of this claim, thus it appears that the claim is derivative of all of the other claims alleged in the Complaint. Complaint ¶¶ 156, 158, 159, 160. To the extent that the UCL claim is derivative, it fails for all of the reasons given throughout this brief for why all of the previous claims must fail.

The remaining allegations of Plaintiff's claim under the UCL consist of conclusory allegations concerning alleged routine practices that have been pled with no supporting facts at all. Complaint ¶¶ 161, 163, 165-177. Plaintiff has failed to support her UCL claim with any facts sufficient to state any cause of action against these Defendants. The Motion to Dismiss Plaintiff's fourteenth cause of action pled under the UCL should be granted.

**9. Plaintiff is not Entitled to Declaratory or Injunctive Relief.**

Plaintiff's fifteenth and sixteenth causes of action seek declaratory and injunctive relief. Plaintiff's declaratory relief claim seeks a declaration that "Defendants have no legal or equitable rights in the Note or Deed of Trust . . . as they have violated both Federal and California statutes." Complaint ¶ 180. Plaintiff's judicial admission in the negligence claim that Wells *was* her creditor dispenses with this claim for declaratory relief. Complaint ¶ 127



1 In addition, this claim seeks the same relief Plaintiff seeks elsewhere in the Complaint: for  
 2 Plaintiff to be judicially awarded a loan modification. Thus, Plaintiff's declaratory relief claim is  
 3 duplicative and fails for that reason, as well. *Id.* Defendants' Motion to Dismiss Plaintiff's  
 4 declaratory relief claim should be granted.

5 Likewise, Plaintiff's request for a temporary restraining order and preliminary injunction is  
 6 based upon all of the previously-pled and insufficient factual allegations. Moreover, Plaintiff has  
 7 supplied no evidence at all in support of her request for an injunction, save a lone declaration  
 8 wherein Plaintiff states her objectionable legal conclusions concerning the status of the legal title to  
 9 her Property, severance of the Note and Deed of Trust, and opinions about the substitution of  
 10 trustee, and factually unsupported opinions about violations of various laws.

11 To prevail on an application for a preliminary injunction, Plaintiff will have to "establish  
 12 four factors: (1) that she is likely to succeed on the merits; (2) that she is likely to suffer irreparable  
 13 harm in the absence of preliminary relief; (3) that the balance of equities tips in her favor; and (4)  
 14 that an injunction is in the public interest." *McCloskey v. Land Home Fin. Servs.*, 2012 U.S. Dist.  
 15 LEXIS 117449, \*3 (N.D. Cal. Aug. 20, 2012). Neither Plaintiff's application for a temporary  
 16 restraining order and order to show cause regarding a preliminary injunction, nor her separately-  
 17 pled cause of action for a preliminary injunction, sets forth any of the required factors which would  
 18 permit this Court to award Plaintiff with the extraordinary remedy of a preliminary injunction.  
 19 Therefore, Plaintiff's request for a preliminary injunction should be denied, and Defendants'  
 20 Motion to Dismiss it should be granted.

### 21 III. CONCLUSION

22 For the foregoing reasons, Defendants respectfully request that their Motion to Dismiss  
 23 Plaintiff's complaint be granted and this case be dismissed with prejudice.

24 Dated: January 18, 2013

SMITH DOLLAR PC

/s/ Sherrill A. Oates

By \_\_\_\_\_

Sherrill A. Oates  
 Attorneys for Defendants

**PROOF OF SERVICE**

I am employed in the County of Sonoma, State of California. I am over the age of 18 years and not a party to the within action. My business address is 404 Mendocino Avenue, Second Floor, Santa Rosa, California 95401. On January 18, 2013, I served the attached **NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the parties to this action by serving:

Lisa A. Church  
230 Olson Road  
Shelter Cove, CA 95589

Pro Se  
Telephone: 707.223.8443  
Facsimile:  
Email:

/XX/ **BY U.S. MAIL:** I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at Santa Rosa, California, following ordinary business practices. I am readily familiar with the practice of Smith Dollar PC for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for processing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 18, 2013



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Debbie Smith

274650

